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No. 97-120

Supreme Court, U.S.
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Supreme Court of the United States
OCTOBER TERM, 1997

CLAUDIA COSGROVE,
Petitioner,
v.
SHEARSON LEHMAN BROTHERS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
I. THE SCOPE OF THE FAA EXCLUSION	1
A. The Conflict in the Circuits	1
B. The Merits of the FAA Exclusion Issue	5
II. ISSUES ARISING IF THE FAA DOES APPLY TO CONTRACTS OF EMPLOYMENT	7
A. Arbitration Imposed as a Condition of Employment	7
B. Requiring Employees to Pay Substantial Arbitration Fees	8
C. Failure to Apprise the Employee that Agreeing to Arbitration Is a Waiver of the Right to a Judicial Forum for Statutory Claims	9
D. Arbitration Before a Panel of Business Executives	9
E. Absence of an Explanation for the Award	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases: Page

Asplundh Tree Expert Co. v. Bates, 71 F.3d 592 (6th Cir. 1995) 4-5
Austin v. Owen-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir.), cert. denied, 117 S.Ct. 432 (1996) 2
Bacashihua v. United States Postal Service, 859 F.2d 402 (6th Cir. 1988) 4
Domino Sugar v. Sugar Workers Local 392, 10 F.3d 1064 (4th Cir. 1993) 2
Gatliff Coal Co. v. Cox, 142 F.2d 876 (6th Cir. 1947) 3
Gibson v. Neighborhood Health Clinics, Inc., 1997 WL 474419 (7th Cir. 1997) 9
Gilmer v. Interstate Johnson Lane Corp., 500 U.S. 20 (1991) ..... *passim*
Hoover Motor Express Co., Inc. v. Teamsters' Local Union No. 327, 217 F.2d 49 (6th Cir. 1954) 3
Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483 (1994) 8
Local 19, Warehouse Processing and Distributive Workers Union v. Buckeye Cotton Oil Co., 236 F.2d 776 (6th Cir. 1956) 3-4
Occidental Chemical Corp. v. International Chemical Workers Union, 853 F.2d 1310 (6th Cir. 1988) 4
Paperworkers v. Misco, Inc., 484 U.S. 29 (1987) 4
Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997), petitions for cert. pending, Nos. 96-1830 & 97-123 6
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) 6
Wedding v. University of Toledo, 89 F.3d 316 (6th Cir. 1996) 5
Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991) 4

Statutes:

Civil Rights Act of 1991, § 118 7-8
Federal Arbitration Act, § 1, 9 U.S.C. § 1 ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
Labor-Management Relations Act, § 301, 29 U.S.C. § 185	6
Railway Labor Act, 45 U.S.C. §§ 151ff	5-6
Miscellaneous:	
Matthew W. Finkin, *Employment Contracts Under the FAA—Reconsidered*, 1997 Lab. L.J. 329	6

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REPLY BRIEF FOR PETITIONER

I. THE SCOPE OF THE FAA EXCLUSION

A. The Conflict in the Circuits

Section 1 of the Federal Arbitration Act excludes from the FAA's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." In *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court "left for another day" the question of "the scope of the § 1 exclusion," as the issue was not squarely presented and had not been properly raised. The scope of the FAA exclusion is squarely presented in this case, and, as we showed in the petition for certiorari, is of immense practical importance. But, says Respondent, that day of decision need never dawn, because:

> Nine different courts of appeal have addressed the exclusion's applicability to *individual* employment

> contract[s] and every one of these courts *currently* is of the view that the exclusion only applies to workers engaged in the actual transportation of goods in commerce." [Br. Op. 9, emphasis added]

As Respondent's artful phrasing betrays, there is more to our conflict assertion than that. For Respondent goes on to concede both that four circuits currently hold that collective bargaining agreements *in all industries* are excluded by FAA § 1,[1] and that "there is little basis in the statutory language to differentiate collective bargaining agreements from individual employee contracts." Br. Op. 15.

Indeed, there is *no* basis for distinguishing the two: if the statutory language excludes collective bargaining contracts in *all* industries—and that is what these four circuits have held—there is no conceivable plausible construction that would lead to the exclusion of individual contracts only in the transportation industry (the interpretation of the court below, App. 3a).[2]

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[1] Br. Op. 14-15 n.10. Respondent suggests that a *dictum* in the most recent decision of the Fourth Circuit "casts considerable doubt" whether it would adhere to that position. *Id.* But other panels of that circuit had twice recently reaffirmed that "in this circuit, the FAA is not applicable to labor disputes arising from collective bargaining agreements." *Austin v. Owen-Brockway Glass Container, Inc.*, 78 F.3d 875, 879 (4th Cir.), *cert. denied*, 117 S.Ct. 432 (1996). See also, *Domino Sugar v. Sugar Workers Local 392*, 10 F.3d 1064, 1067 (4th Cir. 1993) ("[T]he FAA specifically provides that 'nothing herein contained shall apply to contracts of employment of . . . any . . . class of workers engaged in . . . interstate commerce.' 9 U.S.C. § 1 . . . Applying this section, we have consistently recognized that the FAA does not apply to disputes stemming from collective bargaining agreements.")

[2] Of course, if the term "contracts of employment" were construed to embrace only collective bargaining agreements, and not individual contracts, then the holdings could be reconciled. But that is not the position of the court below (for under that construction individual contracts in *all* industries would be covered by the FAA) and, in any event, that would be a preposterous reading of the text.

There is, therefore, a conflict among the circuits over the very point on which we seek certiorari—whether "any other class of workers engaged in . . . commerce" means all such workers or only transportation workers. Respondent suggests that the Court await a case involving a collective bargaining agreement. But if the ultimate interpretation of the phrase remains unsettled, there is no logic to that suggestion: one set of decisions or the other must be wrong, and there is no intrinsic reason to assume it is the "all workers" decisions rather than the "transportation workers" decisions (including that of the court below).

Moreover, as Respondent's careful use of the adjective "currently" reflects, there has been considerable ferment *within* circuits—much of it quite recent—over the correct construction of the FAA § 1 exclusion, and there is no reason to assume either that equilibrium has been reached or that the current decisions are more valid than the earlier ones. The record of the Sixth Circuit (the court below) is illustrative.

That court first ruled, in 1947, in a case involving a coal miner, that FAA § 1 excludes employment contracts in *all* industries. *Gatliff Coal Co. v. Cox,* 142 F.2d 876 ("It is clear that the exception here in question was deliberately worded by the Congress to exclude from the National Arbitration Act all contracts of employment of workers engaged in interstate commerce.")

Then, in 1954, the Sixth Circuit held that a collective bargaining agreement *in the transportation industry* was *not* excluded from the Act's coverage. *Hoover Motor Express Co. Inc. v. Teamsters' Local Union No. 327,* 217 F.2d 49.

In 1956, the Sixth Circuit attempted to reconcile these decisions, declaring that § 1 of the FAA excludes *all individual employment contracts* but *no* collective bargaining agreements. *Local 19, Warehouse Processing and*

Distributive Workers Union v. Buckeye Cotton Oil Co., 236 F.2d 776.

In 1988, the Sixth Circuit in two decisions recanted the *Buckeye Cotton Oil* holding, construing this Court's decision in *Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987) to have held that FAA § 1 excludes collective bargaining agreements, too, from the Act's coverage. *Occidental Chemical Corp. v. International Chemical Workers Union*, 853 F.2d 1310, 1315-16; *Bacashihua v. United States Postal Service*, 859 F.2d 402, 404-05.

In 1991, the Sixth Circuit, in a case involving a brokerage firm, reiterated that FAA §1 excludes *all* employment contracts, individual and collective, from the Act's scope. *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 304.[3]

Four years later, in 1995, the Sixth Circuit held, *for the first time*, that FAA § 1 excludes only employment

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[3] In *Willis*, the court stated:

> A review of the legislative history of the FAA confirms that the FAA was never meant to incorporate employment contracts with the requisite effects on interstate commerce within its scope . . . [A]lthough Congress passed the FAA to ensure that courts honor the contractual agreement of parties who choose to resolve their disputes by arbitration . . ., it limited the scope of the Act by creating a category of contracts not subject to the Act's strictures. . . . Among the category of excluded contracts are "contracts of employment." 9 U.S.C. § 1. [*Id.* at 311].

Noting its 1988 decisions holding that collective bargaining agreements are excluded from coverage, the court added:

> We can see no reason to conclude that individual employment contracts involving employers engaged in interstate commerce should be treated differently. Had Congress intended to limit the meaning of the phrase "contracts of employment" in § 1 of the FAA to encompass only collective bargaining agreements, it surely would have said so. [*Id.* at 312].

Willis went on, however, to hold that the document containing the arbitration agreement in that case—as in *Gilmer*, a Securities Registration Form—was not an employment contract and thus not excluded from FAA coverage. *Id.*

contracts in the transportation industry from the Act's coverage. *Asplundh Tree Expert Company v. Bates*, 71 F.3d 592.

But then, in 1996, another panel of the Sixth Circuit, without citing *Asplundh*, reached the opposite result, declaring the FAA inapplicable to an arbitration agreement covering a university professor, because "the FAA does not apply . . . to labor contracts." *Wedding v. University of Toledo*, 89 F.3d 316, 319 n.2 (citing *Willis* and *Bacashihua*).

Finally, in the decision in the instant case, issued less than six months after *Wedding*, the Sixth Circuit took yet another 180° turn, this time declaring the issue to have been resolved by *Asplundh*.

This record, which is repeated in other circuits, cuts deeply against Respondent's claim that the lower court law shows a consistency of interpretation that renders review by this Court unnecessary.

B. The Merits of the FAA Exclusion Issue

Despite the statement of the drafter of the FAA exclusion clause that the clause was drafted to meet "the objection . . . to the inclusion of workers' contracts in the law's scheme," Pet. 19, Respondent argues that the clause is properly interpreted to exclude only workers' contracts in the transportation industry. In an effort to explain why Congress might plausibly have chosen in the FAA to cover worker contracts at the periphery of interstate commerce while excluding worker contracts at the core of interstate commerce, respondent offers some speculations—perhaps Congress excluded seamen and railroad workers because at least some of their arbitration agreements were regulated by other statutes, and perhaps Congress extended the exclusion to other transportation industries in anticipation that they, too, would be separately regulated. Br. Op. 11-12.

These speculations are made out of whole cloth, and are wholly implausible. Contrary to Respondent's assumption, there was *no* federal law regulating arbitration in the railroad industry when the FAA was enacted: the Railway Labor Act was enacted a year *after* the FAA.[4] What is more, as Respondent implicitly acknowledges, neither the RLA once enacted nor the laws then extant relating to arbitration by seamen covered *all* agreements by employees to arbitrate in those industries, so that neither could explain the *blanket* exclusion of those categories of workers.[5] Finally, there was not at the time of the FAA's passage nor at any later time a proposal to separately regulate arbitration in the trucking and bus industries, and thus no warrant for speculating that Congress excluded them in anticipation of someday doing so.[6]

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[4] "Congress could scarcely have 'noticed' the mandatory arbitration provisions of the Railway Labor Act for that law was not enacted until 1926, the year *after* the arbitration act was passed. (The law governing railroad workers at the time, the Transportation Act of 1920, made no provision for compulsory arbitration.)" Matthew W. Finkin, *Employment Contracts Under the FAA—Reconsidered*, 1997 Lab. L.J. 329, 331.

[5] In the case of seamen, as Respondent recognizes, the objection to FAA coverage was that it would substitute arbitration for judicial proceedings (Br. Op. 11). And, "the Railway Labor Act . . . included provision for compulsory arbitration of *many* disputes." Br. Op. 12, quoting *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997), *petitions for cert. pending*, Nos. 96-1830 & 97-123 (emphasis added).

[6] Twenty-one years later, Congress enacted § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, which made arbitration provisions in collective bargaining agreements enforceable. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). That provision, which by its terms does not apply to individual employment contracts, covered the trucking and bus industries equally with the brokerage industry and other industries affecting commerce.

II. ISSUES ARISING IF THE FAA DOES NOT APPLY TO CONTRACTS OF EMPLOYMENT

A. Arbitration Imposed as a Condition of Employment

Inexplicably, Respondent contends that Petitioner "did not raise . . . below" the contention that arbitration is not enforceable if the agreement was extracted as a condition of employment. Br. Op. 17. In fact, that was a paramount issue raised in Petitioner's briefs in both lower courts.[7] Moreover, Respondent's answering brief in the court of appeals (at 42) both acknowledged that signing the arbitration agreement *was* a condition of employment and that the issue was being advanced by Petitioner:

> Plaintiff argues that the agreement should not be enforced due to the unequal bargaining power of the parties. *Initially, plaintiff fails to distinguish her situation from the plaintiffs in Gilmer and Willis who*

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[7] In the district court, Petitioner stated that "Gilmer has sparked a controversy about the extent of its holding: can employers *require* job applicants to sign arbitration agreements that will *prospectively* waive their rights to judicial adjudication and *force* the employee to submit any future disputes to an arbitration panel. . ." (JA 68, emphasis added) Petitioner argued for a negative answer, contending that such waiver was "not a . . . voluntary waiver." (JA 82; see also, JA 70, 78, 81, 82). In the court of appeals, the summary of argument in Petitioner's brief stated: "Nor can the waiver be considered voluntary where Plaintiff [is] faced with a choice between a waiver and a job . . ." Brief for Plaintiff-Appellant at 8. One section of the Argument portion of the brief was entitled "The Waiver Signed by Appellant Cosgrove Was Neither Knowing Nor Voluntary." *Id.* at 37. The argument for non-voluntariness was based entirely on the fact that "The choice presented to Plaintiff was a 'Hobson's choice.' Plaintiff's choice was between a waiver and a job." *Id.* at 38; see also, *id.* at 42, 45-47. In support of the argument, Petitioner's brief cited a district court decision granting the EEOC a preliminary injunction "against a company which forced employees to sign an ADR arbitration agreement or be fired." *Id.* at 45-46. In an *amicus curiae* brief the EEOC supported Petitioner's contention, citing (at 22-23) the legislative history of § 118 of the Civil Rights Act of 1991 noted in Pet. 23-24.

also had to sign arbitration agreements as a condition of employment." [emphasis added].

On the merits of this issue, Respondent's intimation that the language of § 118 changed between the Conference and Committee Reports and ultimate adoption is incorrect: the language was identical.[8]

B. Requiring Employees to Pay Substantial Arbitration Fees

Here, in contrast to the prior point, while Respondent's contention that the issue was not raised below is debatable, it is fair. We therefore acknowledge that this question does not furnish an independent basis for granting certiorari in this case. However, we continue to submit that the fact that employees would be subjected to paying the arbitrator's fees to pursue their statutory claims casts light on the preceding issue whether employers are permitted to extract an agreement to arbitrate as a condition of employment. The fees for arbitration can be substantial (varying with the length of the hearing) and that prospective cost can chill employees' willingness to assert their statutory rights.

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[8] In an effort to muddy the waters of the legislative history, Respondent cites two statements inserted in the Congressional Record that cited Gilmer "with evident approval." Br. Op. 19 n.13. These statements—which did not address the issues here (for *Gilmer* did not decide those issues—would in any event carry limited weight when compared to the Conference and Committee reports, as the statements came from representatives of what was then the minority party. Indeed, one came from Congressman Hyde, who, as noted in the Petition at 24, had *dissented* from the reporting out of § 118 on the ground that it would be ineffectual in promoting arbitration. As this Court noted in *Landgraf v. USI Film Products*, 511 U.S. 244, ——, 114 S.Ct. 1483, 1495 (1994), "the legislative history discloses some frankly partisan statements about the meaning of the final effective date language."

C. Failure to Apprise the Employee That Agreeing to Arbitration Is a Waiver of the Right to a Judicial Forum for Statutory Claims

We wish to call the Court's attention to a decision issued after our Petition was filed, *Gibson v. Neighborhood Health Clinics, Inc.*, 1997 WL 474419 (7th Cir. Aug. 21, 1997). This decision both refuses to enforce an agreement to arbitrate statutory claims on the ground of lack of consideration, and considers at length, in *dicta*, the issue whether waiver of a judicial forum must be "knowing and voluntary," especially as it entails surrendering the right to jury trial. See Pet. 26-27 & n.36.

D. Arbitration Before a Panel of Business Executives

Respondent reports that the NASD has changed its arbitration rules since this case to assure that the nightmare that confronted Petitioner—arbitration before a panel of business executives—cannot recur. Br. Op. 3, 28. While an implicit acknowledgment of the impropriety of what was done to Petitioner, this change hardly mitigates the importance of the issue. NASD change of position does not change the holding below that employers can extract agreements from their employees to arbitrate before panels of business executives. In industries apart from the securities industry, employers are authorized by this ruling to designate such panels and to impose agreement to bring all statutory claims to such panels as a condition of employment. And even in the securities industry, we do not understand (and Respondent does not contend) that clerical employees such as Ms. Cosgrove must be offered arbitration before the NASD (as compared to another tribunal of the employer's choosing.)

E. Absence of an Explanation for the Award

Respondent's contention that arbitrators should not be required to explain their awards in statutory cases because juries aren't so required, Br. Op. 29, misses the point

entirely. In a jury trial, a judge trained in the law decides all legal issues and delivers instructions to the jury which can be reviewed for legal error. These arbitrators, by contrast, had no grounding in the law, had been told by the NASD that they need not follow legal precedents (Pet. 29-30 n.41), and left no traces of the criteria they applied in deciding the case.

CONCLUSION

For the reasons stated in the petition and this reply brief, the petition for writ of certiorari should be granted.

Respectfully submitted,

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